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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RONALD BRECHTEL, Petitioner

VERSUS

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether an indictment is multiplicitous when it charges each of two loans to the same individual for purchase of the same plot of land as a separate violation of 18 U.S.C. §1006.

II. Whether preventing the petitioner from presenting evidence showing that he lacked the intent to defraud because he was personally unaware of the transactions making up the basis of the indictment deprived him of his defense.

III. Whether a grouping of offenses previously subject to a five year statute of limitations for prosecution as "Noncapital Offenses", and now extended to ten years as "Financial Institution

Offenses" constitutes a substantive change in the law so as to violate the provisions of the Ex Post Facto Clause of the United States Constitution.

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinions of the District Court were not reported.

JURISDICTION

The judgement of the Court of Appeals for the Fifth Circuit was entered on August 2, 1993. An out of time petition for rehearing was denied on September 21, 1993. This petition for certiorari is filed within ninety days of the original judgment of the COurt of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §1006:

Federal credit institution entries,

reports and transactions

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through

the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration, or any small business investment

company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any

note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be

fined not more than $10,000 or imprisoned not more than five years, or both.

Article 1, Section 9, Clause 3 of the United States Constitution Provides:

No bill of attainder or ex post facto law shall be passed

STATEMENT OF THE CASE

On August 29, 1991, Ronald Brechtel (hereinafter "Petitioner") and Phillip Gattuso (hereinafter jointly ~~referred to~~ as "defendants") were indicted in a four count indictment alleging violations of United States Code Sections 1006 and 2.

In Count 1 of the Indictment, it was alleged that the defendants were partners in the Saulet Partnership which sold

property to G&N Enterprises, owned by developer Stavros Amitsas, through Nikitas Pepis, who received a loan for the purchase from Enterprise. Further, that the defendants allegedly never informed the Enterprise board of directors that they had a pecuniary interest in this loan. Through this transaction the defendants' partnership is alleged to have received a down payment and held a first mortgage on the Saulet Property, even though Enterprise had loaned sufficient money for full payment. In Count 2 (R.vol.1, pp. 174-178).

In Count 2 was alleged that the defendants were partners in the Ames Farm Partnership which sold property to Lynn Yao, another Nikitas Pepis associate, who also received a loan for the purchase

from Enterprise. Further, the defendants allegedly never informed the Enterprise board of directors that they would benefit from this loan. Through this transaction the defendants partnership is alleged to have received cash and a promissory note from Lynn Yao. (R.vol. 1, pp. 174, 178-181).

In Count 3, it was alleged that when the Saulet Partnership threatened to foreclose on Nikitas Pepis for non-payment on the promissory note, the president of Enterprise allegedly paid the Saulet Partnership the balance due it. Further, that the defendants, allegedly never informed the Enterprise board of directors that they were benefiting from this transaction. (R.vol. 1, p. 177).

In Count 4 it was alleged that when

the Ames Farm Partnership threatened to foreclose on Lynn Yao for non-payment on the promissory note he applied to the Enterprise Loan Committee for a loan to consolidate his debt and pay off the note on the Ames Farm Property. Further, that the board of directors approved this loan, but, that the defendants allegedly never informed the board that they would benefit through the approval of this loan. (R.vol. 1, pp. 179-180).

Defendants' motions to dismiss specific counts of the indictment were denied on December 17, 1991. (R.vol. 1, p. 125).

A jury trial was held before the Honorable Edith Brown, Clement. (R.vol. 1, p. 106).

During the trial, defendants' motions for a directed verdict and a judgment of

acquittal were denied. (R.vol. 1, p. 104). Also during the trial, the Court sua sponte ruled that the petitioner could not have the opportunity to call a "habit" witness, James Mangum, defendant's stock broker. (R.,vol. 4, pp. 424-428). Petitioner wished to establish, through Mangum, that he was in the habit of entrusting to certain individuals, including Mangum and Sam Gattuso, Petitioner's real estate agent, with the authority to invest large sums of Petitioner's money on their own, and without Petitioner's consent or knowledge of the specific transactions they undertook on Petitioner's behalf.

By establishing such a habit, Petitioner wished to show that he had no criminal intent in the case at bar because he was unaware of the specific

transactions that formed the basis of his indictment and conviction.

Moreover, because Petitioner's real estate agent, Sam Gattuso, died before trial, it was vital for Petitioner to have the testimony of his stock broker to establish his habit evidence.

Petitioner was convicted of Counts 2 and 4 (R.vol. 1, p. 47). Both defendants made motions for a new trial, which were denied (R.vol. 1, pp. 64, 70, 55, 56).

Petitioner was convicted of Counts 2 and 4, and sentenced to one year to be served at the Volunteers of America Community Correction Center in New Orleans; $991.00 per month cost of confinement; 2,080 hours of community service work and $321,600.00 restitution to the RTC. (R.vol. 1, p. 9).

On May 5, 1992, Judge Clement issued a

Judgment Amending the Judgment and Probation/Commitment Order.

This Amendment stated that:

> IT IS ORDERED that the Judgment and Probation/Commitment Order of April 23, 1992 is AMENDED to read as follows:
>
> The defendant is hereby committed to the custody of the Attorney General to be imprisoned for a term of one year as to Count 2. R.vol. 1, p. 38.

Petitioner appealed both the conviction and the denial of his motion for a new trial. (R.vol. 1, pp. 52, 54). The United States Fifth Circuit Court of Appeals (hereinafter the "Appeals Court") affirmed the convictions and denied a rehearing. This appeal was taken pursuant to 28 U.S.C. 1291 which states that: '"The Court of Appeals shall have jurisdiction of appeals from all final

decisions of the District Courts of the United States." Petitioner then applied for writs to the present Court.

REASONS FOR GRANTING THE WRIT

I. AN INDICTMENT IS MULTIPLICITOUS WHEN IT CHARGES EACH OF TWO LOANS TO THE SAME INDIVIDUAL FOR PURCHASE OF THE SAME PLOT OF LAND AS A SEPARATE VIOLATION OF 18 U.S.C. §1006.

The indictment describes various transactions involving the defendants, the two properties and Enterprise. The indictment then charges the defendants with four counts as follows:

COUNT	DATE	BENEFIT TO PARTNERSHIP	TRANSACT
I	1/1/85	$52,500	Nikitas Loan
II	4/1/85	$121,200	Lynn Yao loan
III	4/22/86	$297,000	Nikitas mortgage purchase
IV	8/12/86	$522,000	Lynn Yao workout

All in violation to Title 18, United States Code, Sections 1006 and 2. (R.vol. 1, pp. 174-181).

Defendants brought a Motion to Dismiss on the grounds that the indictment was

defective on the grounds of multiplicity. Defendants further contended that the indictment in essence alleged that they used two pieces of property in the furtherance of an alleged scheme to obtain unlawful benefits from Enterprise. Thus, the indictment which charges four counts was multiplicious. Counts 1 and 2 should have been dismissed as they were multiplicious. Of course, Petitioner was found not guilty on Count 1, so that issue is moot as to Petitioner.

However, Petitioner contends that the indictment was defective because it was multiplicious as to Counts II and IV, which involve the Ames Property and the Lynn Yao loan. Counts II and IV are actually only part of a course of proscribed conduct punishable as one criminal event as to the use of each

piece of property. Specifically, Petitioner contends that Count II is merely a collateral attempt at effectuating the alleged scheme charged in Count IV and is multiplicious and not actually a separate crime from the conduct charged in Count IV. Further, that the proof used to convict on Count II is merged into Count IV and is thus multiplicious.

As shown in the aforedescribed analysis of the counts, there was an impermissible splintering within the indictment of facts constituting a single offense.

The version of 18 USC 1006 which is applicable to the time frame in this indictment states in pertinent part that:

§1006. Federal credit institution entries, reports and transactions

Whoever, being an

officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such

institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree, or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not

> more than five years, or both. 18 USC § 1006(West 1976).

In the case at bar the Government impermissibly charged the same conduct, involving the same property to constitute separate counts.

This rendered the indictment defective as to those counts. Multiplicity in an indictment raises double jeopardy problems.

> "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ." U.S. Const., Amend. V.

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spectral units. Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221 (1977)."

Petitioner submits to this Court that

by permitting the indictment to stand, Petitioner's constitutional right not to be punished twice for the same crime was violated.

The Fifth Circuit Court of Appeals very recently discussed the concept of multiplicity in a multicount indictment based on violations of 18 USC 1344. In U.S. vs. Lemons, 941 F.2d 309 (5th Cir. 1991), the Court stated that:

> "Multiplicity" is charging a single offense in more than one count in an indictment. Accordingly, it "addresses double jeopardy; and where the jury is allowed to return convictions on multiplicious counts, the remedy is to remand for resentencing, with the government dismissing the counts(s) that created the multiplicity." United States v. Moody, 923 F.2d 341, 347 (5th Cir. 1991). "The chief danger raised by a multiplicious indictment is the possibility that the

> defendant will receive more than one sentence for a single offense." United States v. Swain, 757 F.2d 1530, 1537 (5th Cir.), cert. denied, 474 U.S. 825, 106 S.Ct. 81, 88 L.Ed.2d 66 (1985). "Moreover, [w]hether a continuous transaction results in the commission of but a single offense or separate offenses. . . is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed." Id. at 1536 (quoting United States v. Shaid, 730 F.2d 225, 231 (5th Cir.), cert denied, 469 U.S. 844, 105 S.Ct. 151, 83 L.Ed.2d 89 (1984)); see also United States v. Guzman, 781 F.2d 428, 432 (5th Cir.), cert denied 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986). Id. at 317.

In the case at bar, where the indictment bases some of the counts on the same conduct, the Lemons, definition for multiplicity applies.

The indictment refers to a scheme to

gain unlawful benefit. The indictment further describes various steps the Defendants were alleged to have taken in furtherance of the "scheme."

The Court in Lemons, while considering a different statute 18 USC § 1344, addressed the problem of the Government charging separate counts as to every step in the execution of a "scheme." While Lemons dealt with a different statute the standards on multiplicity apply to all cases.

In Lemons, the defendant was charged in count 1 and 2 with the initial acts to defraud the Vernon Savings and Loan Association (hereinafter referred to as Vernon). He was charged with scheming to defraud Vernon of several million dollars in Count 1 and 2. In counts 3-8 he was charged in separate counts with acts

which Lemon contended were in furtherance of the scheme charged in counts 1 and 2. Id. at 316-318.

After losing his Motion To Dismiss in the Trial Court and subsequently being convicted on the initial counts and the purportedly multiplicious counts, Lemon, appealed his conviction to the Fifth Circuit Court of Appeals.

The Court agreed with Lemons that some of the counts were multiplicious and found that:

> Concerning Vernon there was but one scheme and one execution. The movement of the benefit to Lemons, although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme.
>
> As stated, although the acts charged in counts 1-8 were in furtherance of the scheme, there was but one execution of the

> scheme. To hold otherwise, on these facts, renders the reach of §1344 potentially boundless. Accordingly, we hold that the convictions on counts 3-8 are multiplicitous to those on counts 1 and 2. Therefore, we reverse and vacate the convictions on counts 3-8. It may be that the convictions on counts 1 and 2 are multiplicitous with respect to one another; however as noted, Lemons does not appeal his convictions on those counts (for which he received concurrent sentences of five years.
>
> Id. at 318 (footnote citations omitted).

In the case at bar, it is submitted that the indictment actually only alleges one scheme, specifically, one scheme to use property to procure unlawful benefits. In fact the indictment describes the offense as a single scheme, but divides it into two subsections as follows:

"Ames Farm Lot J-8 Counts 2 and 4." (R.vol. 1, p. 174-181).

The Government's attempt to divide the alleged scheme involving one piece of property into two counts is defective and involve overlapping proofs.

In United States v. Sue, 586 F.2d 70 (8th Cir. 1978) defendant Sue contended that his three count indictment for violations of 18 USC 1014 was multiplicious. Id. at 71. The Court of Appeals agreed and further discussed the fact that a defendant is prejudiced by multiplicity in two ways:

> There are two principal sources of prejudice. The source relied upon by Sue is that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." United

> States v. Hearod, supra, 499 F.2d at 1005. The theory is that the jury's deliberations as to all counts (not just the multiplicious counts may be tainted by the multiplicity. . . .
>
> [t]he second source of prejudice caused by a multiplicious indictment. "The principal danger raised by a multiplicious indictment is the possibility that the defendant will receive more than one sentence for a single offense." United States v. Hearod, supra, 499 F.2d at 1005. Id. at 71, 72 (citation omitted).

In the present case, Petitioner was convicted for the same offense twice in violation of his double jeopardy rights. The Appeals Court however, rejected Petitioner's contention of multiplicity, despite the fact that the base offense involved two loans to the same individual for purchase of the same plot of land, each was of which was charged as a

separate violation of 18 U.S.C. §1006. In addressing a multiplicity claim, the appellate court is bound to review all sources from which legislative intent may be gleaned. U.S. v. Cooper, 966 F.2d 936, 942 (5th Cir. 1992) cert. den. 113 S.Ct. 481, 121 L.Ed.2d 136. The task is to discern Congress' intent by looking first to the plain language of the statute, then to the legislative history and then to the overall statutory scheme of which it is a part. Id. When the concern is multiplicity, what must be determined is what the allowable "unit of prosecution" was intended to be, that is, how a defendant's actions can be combined or split up so as to constitute separate violations of a particular law. Id.

This examination is particularly problematic with 18 U.S.C. §1006, since

the legislative history is effectively nonexistent. While this honorable Court limited itself to an examination of the plain language of the statute, other case law exists that interprets 18 U.S.C. §1006 in a different light. For example, the Fifth Circuit has held that the statute is meant to cover "much more" than unsophisticated embezzlement, larceny or theft. Beaudine v. United States, 368 F.2d 417, 420 (5th Cir. 1966) Under Beaudine, the intent of the law is to keep "that part of the market in which the federal government plays such a significant role free from fraud...' Id. Thus, the focus lies not so much on single activities, as activities permeated with the intent to defraud.

For example, in U.S. v. McMurray, 680 F.2d 695, (5th Cir. 1981), the Court held

that the relevant determinant in cases of double jeopardy and charges under 18 U.S.C. §1006 was the "singleness of the ultimate objective". McMurray, 680 F.2d at 698. In McMurray, a number of false entries were made into bank ledgers for the final purpose of fraudulently attaining loans from the Federal Small Business Administration. McMurray at 696. The court in McMurray held that despite the complicated arrangements, and number of individuals involved, since the end goal was the same, there was but one conspiracy.

Similarly, in the case at bar, the singleness of the objective is apparent. All of the Yao loans went to debt financing of the purchase of the Ames farm parcel. The single objective was to complete the purchase of a parcel which

Petitioner was ostensibly a knowledgeable part owner of. Accordingly, counts two and four of the indictment were multiplicitous, and violated Petitioner's rights against double jeopardy.

II. BY PREVENTING THE PETITIONER FROM PRESENTING EVIDENCE SHOWING THAT HE LACKED THE INTENT TO DEFRAUD BECAUSE HE WAS PERSONALLY UNAWARE OF THE TRANSACTIONS MAKING UP THE BASIS OF THE INDICTMENT THE TRIAL COURT DEPRIVED PETITIONER OF HIS DEFENSE

Petitionēr was denied the opportunity to call "habit" witness, James Mangum, defendant's stock broker, when the Court, sua sponte, decided to exclude the testimony. (R.vol. 4, pp. 424-428). Petitioner wished to establish, through Mangum, that he was in the habit of entrusting to certain individuals,

including Mangum and Sam Gattuso, Petitioner's real estate agent, with the authority to invest large sums of Petitioner's money on their own, and without Petitioner's consent or knowledge of the specific transactions they undertook on Petitioner's behalf.

By establishing such a habit, Petitioner wished to show that he had no criminal intent in the case at bar because he was unaware of the specific transactions that formed the basis of his indictment and conviction, such transactions being undertaken on Petitioner's behalf, but without his knowledge or consent, by individuals in which defendant placed great trust and reliance.

Federal Rule of Evidence 406 provides that:

> Rule 406. Habit; Routine Practice.
>
> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Fed. Rule of Evid. 406 (West 1984).

In Spartan Grain & Mills Company v. Ayers, 517 F. 2d 214 (5th Cir. 1975) affirmed in part, reversed in part on other grounds, 581 F. 2d 419 (5th Cir. 1978), the United States Fifth Circuit Court of Appeals held that the district court erred in his refusal to admit evidence of trade or business custom. Id. at 219.

Specifically, the Court stated that:

> Evidence of a trade

> or business custom is admissible for the purpose of showing that the custom was followed in a particular instance; likewise, evidence of other transactions or occurrences is admissible if relevant and not too likely to confuse a jury or prejudice the opposing party. T. F. Greene, The Georgia Law of Evidence 169, 171 (1957); McCormick, Evidence, 464, 2nd Ed. (1972); Russell v. Pitts, 105 Ga.App. 147, 149 123 S.E.2d 708, 710 (1961) ("[I]t is generally permissible to allow a witness to testify from his own knowledge as to the usual custom or course of dealing involving the business routine of the party involved . . . .)" Spartan Grain, supra, 517 F.2d at 219.

In United States v. Quezada, 754 F.2d 1190 (5th Cir. 1985) the U.S. Fifth Circuit cited Spartan Grain, supra and Rule 406 for the proposition that the government could, in a criminal case,

present evidence, in accordance with Federal Rule of Evidence 406, to establish the normal practice used by Immigration and Naturalization agents to execute a warrant of deportation. Id. at 1195.

Specifically, the Court stated that:

> The government's strategy was clearly to use Agent Meshirer's testimony to establish the normal practice of the INS in order to prove conduct in conformity therewith, in accordance with F.R.Evid. 406. This court has recognized the admissibility of such evidence. See, e.g., Spartan Grain and Mill Company v. Ayers, 517 F.2d 214, 219 (5th Cir. 1975); Stevens v. U.S., 306 F.2d 834 (5th Cir. 1962). Quezada, supra, 754 F.2d at 1195.

The Court permitted the testimony of Meshirer even though Meshirer admitted that he had never observed the execution

of a warrant. Id.

The Court in Quezada noted that Agent Meshirer had knowledge of the procedure of deportation. Id. at 1196. Finally the Court stated that:

> [W]hile Agent Meshirer's testimony does not reveal that he had physically observed the execution of a warrant of deportation, we believe it is sufficient to permit the conclusion that he was familiar with the procedure. The properly admitted testimony corroborated the proof of deportation contained on the warrant itself. Additionally, the testimony permits the conclusion that, through the use of Form I-294, appellant was informed in his native language of the penalties for illegal reentry . . . . Id.

It would seem that if, in a criminal prosecution, the government is allowed to present evidence of habit to prove conduct in conformity therewith, that

justice would require that a defendant in a criminal prosecution should be afforded the same right, as part of his defense.

In the case at bar, Petitioner wished to establish that it was his habit and his routine business practice to allow persons he trusted to act on his behalf without his knowledge and without securing his consent. To establish these facts, Petitioner wished to introduce evidence that he was in the habit of permitting his real estate agent and his stock broker to act on his behalf on their own initiative.

Unfortunately, Petitioner's real estate agent, Sam Gattuso, died before defendant's trial (R.vol. 4, p. 428). Therefore, it was essential that James Mangum be allowed to testify as to Petitioner's habit.

Mr. Mangum, Petitioner's stock broker, would have testified that Petitioner gave him carte blanche authority to enter into stock transactions that he deemed to be in the best economic interest of Petitioner.

Petitioner's stockbroker was familiar with Petitioner's normal practice of allowing trusted individuals to act in his interest, but without his specific knowledge or consent. The testimony of Petitioner's stockbroker was intended to establish the normal practice of Petitioner in order to prove conduct in conformity therewith. Quezada, supra, 754 F.2d at 1195.

By establishing Petitioner's habit of trust with such individuals as his stock broker and his real estate agent, Petitioner would have been able to attack

the crucial mens rea element of the criminal charges brought against him. Obviously, if Petitioner was unaware of the transactions for which he was charged, he had no criminal intent.

The case of United States v. Riley, 550 F.2d 233 (5th Cir. 1977) is almost directly on point with the case at bar. In Riley, the president of a bank was indicted under 18 USC 656 for unlawful, banking practices. Id. at 234-236. Riley's defense was that he lacked the requisite intent to injure and defraud the bank. Id. at 236. Riley proffered evidence of eighty other instances of similar transactions to show that the transactions were above board, and were simply informal loans and extensions of credit to bank officers permitted under Federal Regulations. Id.

The trial court rejected the proffer, holding that evidence of custom and practice could not excuse a criminal violation. Id.

In reversing the conviction, the United States Fifth Circuit Court of Appeals states that:

> Although the trial judge is traditionally accorded a wide range of discretion in the admission of evidence, United States v. Linetsky, 533 F.2d 192, 204 (5th Cir. 1976), it is axiomatic that such discretion does not extend to the exclusion of crucial relevant evidence establishing a valid defense. The government argues that "custom and usage involving criminality do not defeat a prosecution for violation of a federal criminal statute." United States v. Brookshire, 514 F.2d 786, 789 (10th Cir. 1975). In Burnett v. United States, 222 F.2d 426 (6th Cir. 1955), an Army officer was convicted

of having subordinates build household items for him. On appeal the Sixth Circuit upheld the exclusion of evidence that Army custom permitted the practice. Similarly, the Ninth Circuit upheld the exclusion of evidence that other persons had submitted false vouchers to the Veterans Administration for payment. Smith v. United States, 188 F.2d 969 (9th Cir. 1951).

While a general practice is not an absolute defense to criminality we think the wiser, and in this case mandated, approach is to let the jury consider the practice in determining whether Riley intended to injure and defraud the bank. United States v. Klock, 210 F.2d 217 (2nd Cir. 1954), supports this position. Klock, a supervisor in his bank's bookkeeping department, was charged with causing the bank to pay a customer for his checks even though the account had insufficient funds to cover them. The Second Circuit reversed the

conviction under § 656 because the trial judge excluded evidence that officials at the bank had authorized the overdraft by the customer and other customers. The court rejected the theory that authorization would be no defense:

> If these exhibits had been received in evidence, the jury could have then reasonably inferred that not only did the bank's officers consider those overdrafts informally made loans. The jury could further reasonably have inferred that the bank officers, thus considering the overdrafts as loans, had authorized Klock to omit posting them as debits against depositors' accounts. In effect, the defense to the substantive counts of misapplication of funds was that the bank officials treated the overdrafts as loans. While perhaps making of loans in this manner may be in violation of some state law, nevertheless it does not constitute a crime under 12 U.S.C.A. § 592 or 18 U.S.C. § 656, if

Klock had no notice of the impropriety. Defendants were therefore entitled to introduce evidence tending to show that they were acting in accord with the bank's practice of making loans informally, and that the bank had acquiesced in Klock's bookkeeping in respect to these loans. 210 F.2d at 221.

We think this approach is eminently sensible. It has been recognized implicitly by our circuit. It is unnecessary for an indictment charging a violation of § 656 to allege that the misapplication of funds was without the knowledge of the bank or its board of directors, "since such consent is a matter of defense." United States v. Mann, supra, at 268, citing Klock, supra. In United States v. Stokes, 471 F.2d 1318 (5th Cir. 1973), Judge Wisdom distinguished Klock because the evidence which Stokes sought to introduce consisted of "irregularity in other unrelated and dissimilar bank operations." Stokes,

supra, at 1321. Another facet of Stokes which separates it from Klock and our case was Stokes' failure to contend that he acted according to any regular bank policy or practice.

The government argues that Klock is distinguishable on two grounds: (1) the defendant in that case was a subordinate who relied upon his superiors' instructions and (2) knowledge of impropriety would obliterate the defense. It was not Klock's position at the bank so much as his state of mind that was important. If Riley believed that bank policy authorized such transactions, then he lacked the requisite intent. The government's contention that Riley was the chief executive officer of the bank and therefore could not rely on this defense is a jury argument, not a legal one. The jury might have rejected this defense as a sham. It might have considered the alleged policy to be Riley's

cynical generosity to a few cronies at the expense of others. But that was for the jury to resolve.

We buttress our decision that such exclusion was reversible error by reference to Potter v. United States, 155 U.S. 438, 15 S.Ct. 144, 39 L.Ed.214 (1894). Potter was charged with willfully certifying a check for a customer whose funds were insufficient. His defense was that the overdraft was being treated by the bank as a loan and that the customer was covering the certified checks as they were presented. The court agreed per Justice Brewer that:

"The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and that such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith,

supposed that this arrangement was the equivalent of a loan by note, and that the indebtedness of Evans & Co. was fully secured by collateral, it seems to us that the jury would have a right to be informed of the fact as bearing upon the question whether he had "willfully" violated the statute. It cannot be that the guilt or innocence of the defendant under this indictment turns upon the mere matter of bookkeeping. While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offenses, and subjecting them to the severe punishments which may be imposed under those statutes. We must not be understood as holding that this testimony established

an absolute defense, and that by the form of such an agreement the mandatory terms of section 5208 can be evaded, but only that evidence of a positive agreement upon the part of the officers of the bank that this overdraft account should be practically treated as a loan from day to day, to be and in fact secured by ample collateral--coupled with testimony that for the cheques certified each day there was deposited in advance an ample amount of cash--should have been submitted to the jury on the question of "willful" wrongdoing. As "willful" wrong is of the essence of the accusation, testimony bearing directly on the question of wilfulness is of vital importance, and error in rejecting it cannot be regarded otherwise than as material and manifestly prejudicial." 155 U.S. at 447-48, 15 S.Ct. at 147.

Riley's defense was premised upon the propriety of his practices and his lack of intent to injure and defraud the

> bank. His defense may or may not be reasonable to a jury but we believe he should have the right to present it. Riley, supra, 550 F.2d at 236-239.

In the case at bar, Petitioner should have had the opportunity to present evidence that he lacked criminal intent. The trial court thus, committed reversible error when it refused to allow him to introduce such evidence.

In its opinion, the Appeals Court noted that United States v Riley, 550 F.2d 233 (5th Cir. 1977) stood in part for the proposition that an exclusion of evidence that effectively prevents a defendant from presenting his defense will be reversed. United States v. Brechtel, slip op. p. 10. Petitioner respectfully contends that the district court's action in excluding Mr. Mangum's

proffered testimony effectively precluded him from presenting his defense. It is well established that an intent to defraud is an essential element in proving a violation of 18 U.S.C. 1006. Beaudine v. U.S., 368 F.2d 417, 420 (5th Cir. 1966). This Circuit has itself noted the following jury charge with approval:

> "To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self.
> Id. f. 4.

However, the Appeals Court held that the testimony in question in the instant case would have had less probative force than that in Riley. Slip op. p. 11. The Appeals Court also noted that the trial court exclusion of evidence in Riley, the

offer of eighty other instances when actions similar to those defendant was charged with occurred, was premised on a different objection than Rule 403, specifically, that custom or habit does not excuse a criminal violation. United States v. Riley, 550 F.2d 233, 236. (5th CIr. 1977) Petitioner respectfully contends that he is not seeking to disprove actions taken, or to waive their criminality by asserting that they were a "habit", but rather to again attack the crucial element of intent to defraud. The jury instruction quoted above from Beaudine clearly indicates that for a violation of 18 U.S.C. §1006 to be found, that not only is knowledge needed of the action, but that there be the purpose to cause loss to another or gain to oneself. By introducing "habit" evidence of

Petitioner's hands off attitude towards his real estate investments, the proffered evidence would serve as a defense to both the presence of acting knowingly, as well as working towards a purpose of self benefit. The Appeals Court noted that the discretion normally extended to trial courts making Rule 403 decisions is not extended to the exclusion of crucial relevant evidence establishing a valid defense. Slip op. p. 11. As noted in Beaudine "fraud commences with deceit". Beaudine, 368 F.2d 417, 420. Whether petitioner had knowledge of the transactions is thus crucial relevant evidence that should not be excluded.

In its opinion, the Appellate Court found fault with the fact that testimony on Petitioner's relationship with his

real estate adviser, the deceased Sam Gattuso, would have to be analogized from the evidence proffered, his relationship with his stock broker. SLip op, p. 9-10. While not the most direct way of proving a habit, it is the only way of asserting a crucial defense. Moreover, case law permitting introduction of "habits" not even under indictment emphasizes the thought that the crippling of an important defense also must be considered in making a Rule 403 decision. In U.S. v. McGuire, 744 F.2d 1197, (6th CIr. 1984) evidence of loan applications not even included in the indictment was permitted, since these also related to the intent of the defendant parties in the handling of loan proceeds. 744 F.2d at 1205-06. Similarly, in the case at bar, while Mr. Mangum's testimony would

cover stock transactions that were not part of the indictment, they could readily serve as prove of Petitioner's intent, or lack there of, in handling his real estate transactions.

Similarly, in Hill v. Bache Halsey Stuart Shields Inc., 790 F.2d 817 (10th Cir. 1986), evidence of trading practices subsequent to those that were the basis for the suit were held to be admissible evidence. The evidence was offered to show one party's degree of control over his investments, his sophistication as an investor, his general trading habits and practices. The trial court, as in the instant case, excluded the evidence as being more confusing than probative under Rule 403. Hill, 790 F.2d at 825. The Tenth Circuit reversed. The Court held that evidence of later trading practices

was highly relevant to the trading practices at issue in the suit, particularly because the later practices occurred only five months after those at issue. Id. at 826. In addition, the impact of the withheld evidence was enhanced, because without it the jury heard unsupported allegations regarding the investor's amount of authorization over his investments and the like. Id.

Similarly, in the case at bar, Petitioner Brechtel offered testimony of practices occurring simultaneously to those at issue in the case. If anything, these practices should be as relevant, if not more so, than the evidence regarding later transactions held admissible in Hill. Also, absent the proffered evidence, testimony regarding Petitioner's practices would be similarly

reduced to "unsupported allegations from both sides". Hill at 826.

The Court in Hill noted that inherent in the introduction of such evidence was the potential for confusion and delay. But the evidence must be "substantially outweighed" by this danger to justify exclusion. Id. Moreover, the district court retains the power to require a straightforward, unelaborate presentation of the evidence, so as to minimize delay and confusion. Id. The evidence can be limited to presentation in summary form, or even to expert testimony on observed similarities, without going into detail on each transaction to make the point. Id. Clearly, such aids to presenting the evidence were available to the district court in the case at bar, but were not used. Petitioner repeats his contention

that this was erroneous, especially given the ability to present a simple and straightforward summary of his practices.

Finally, in the case at bar, the trial court alternately held that the proffered evidence was irrelevant. However, Hill also stands for the proposition that, when the circumstances mirror those in Hill, relevancy must be viewed generously, and with the consideration that it will be found if the evidence has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.'" Hill at 826, citing E. Cleary, McCormick On Evidence, §185, at 547 n.37 (3d ed. 1984). Even though Mangum's testimony related to stock rather than real estate transactions,

both inherently revolve around how Petitioner Brechtel handled his investments. As such, the evidence would be relevant, and should have been admitted.

III. THE STATUTE OF LIMITATIONS HAD RUN.

The Case against Petitioner had prescribed at the time of the indictment. The applicable statute of limitation for the charges made against Petitioner is 18 U.S.C. 3282. That statute provides that:

> 3282. Offenses not capital
> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed. (West 1985).

In accordance with 18 U.S.C. 3282, the Government had five years to bring criminal charges against Petitioner. However, from the face of the indictment itself, the Government had until August 12, 1991, to bring charges against Petitioner. (R.vol.1, pp. 174-181). Consequently, the indictment, which was filed on August 23, 1991, (R.vol. 1, p. 174), reveals that the statute of limitations had run before charges were brought against Petitioner.

Although the both the Appeals Court and the Government cited the case of U.S. v. Madia, 955 F.2d 538 (8th Cir. 1992) in support of the argument that 18 USC 3293 has retroactively extended the statute of limitations from five years to ten years, the U.S. Fifth Circuit was not bound by the decision of the Eight Circuit Court,

when it handed down its opinion in the instant case.

Moreover, the Madia case did not involve 18 USC 1006, the statute under which Petitioner was convicted. Therefore, that case has no application to the case at bar. In addition, besides United States v. Taliferro 979 F.2d 1399 (10th Cir. 1992) and United States v. Knipp 963 F.2d 839 (6th Cir. 1992), the remaining circuits have as yet to discuss this issue with regard to 18 USC 3293.

Consequently, Petitioner respectfully requests that the present Court grant certiorari to resolve this issue that remains undecided in many circuits, that is, if the extension of the limitations period under 18 USC 1893 is an ex post facto law prohibited by Art. I, § 9, cl. 3 of the Constitution, and if so, that

the Petitioner's conviction under 18 USC 1006 should be overturned as the Government failed to timely pursue the prosecution in this case.

The Appeals court in the instant case devoted the larger part of their dismissal of Petitioner's limitations period claim to this Honorable Court's opinion in Collins v. Youngblood, 497 U.S. 37, 110 S.Ct 2715, 111 L.Ed.2d 30 (1990). However, within Youngblood, this Court noted: "to say that by simply labelling a law 'procedural' a legislature does not immunize it from scrutiny under the Ex Post Facto Clause.....Subtle ex- post facto violations are no more permissible than overt ones" Youngblood, 497 U.S. at 46. Petitioner respectfully contends that 18 U.S.C. 3293, by creating the new class of

"Financial Institution Offenses", has in effect gone beyond the realm of the procedural, and has wrought substantive changes to the law under which the Petitioner was indicted and convicted. 18 U.S.C. 3293 created a new and distinct class of offenses that did not previously exist in the United States Code, by extending the amount of time during which certain offenses, which would have previously been time limited from prosecution as "Offenses Not Capital" under 18 USC 3282, could be prosecuted. By grouping these offenses together, removing them from the realm of "Offenses Not Capital" and a five year statute of limitations, and extending the time limitations from five years to ten years, the United States Congress clearly created a new class of offense, with

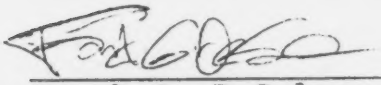
considerably greater ramifications for the offender. While the elements and punishments might have remained the same for these offenses, a doubling of the statute of limitations for a concurrently newly grouped class of offenses cannot be taken solely as "procedural." By allowing the ripples from a stone cast into a puddle to ripple further or for a longer period of time, one has, in effect changed the weight of the stone. Similarly, the nature of the offense is changed and made more serious by allowing prosecution and punishment to extend for a longer period of time.

CONCLUSION

For the reasons stated herein, Petitioner's conviction on both Counts should be reversed. In the alternative

Petitioner's conviction as to one of the counts should be reversed for reasons of double jeopardy. In addition or in the alternative Petitioner should be granted a new trial and the matter remanded to the trial court.

Respectfully submitted:



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CERTIFICATE

I certify that a copy of the foregoing pleadings has been served on counsel for all parties by depositing same in the United State Mails, postage prepaid and properly addressed this first of November, 1993

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-3342

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

RONALD C. BRECHTEL and
PHILLIP H. GATTUSO,
Defendants-Appellants

Appeals from the United States District Court

For the Eastern District of Louisiana

Before POLITZ, Chief Judge, KING and DUHE, Circuit Judges.

PER CURIAM:

Ronald Brechtel and Phillip Gattuso appeal their convictions of unlawful participation in benefits from savings and loan transactions, in violation of 18 U.S.C. §§ 2, 1006. finding no reversible error in either Brechtel's or Gattuso's convictions, we affirm.

Background

Brechtel and Gattuso served as directors of Enterprise Federal Savings & Loan (EFS&L). Brechtel also served as secretary of the board and as a member of the loan committee. In addition to their involvement with EFS&L, Brechtel and Gattuso had interests in the Saulet and Ames Farm partnerhsips, two real estate development concerns owning land in Jefferson Parish, Louisiana. Gattuso's cousin Roy Gattuso managed those partnerships.

In 1984 and 1985, Gattuso executed documents by which Saulet and Ames Farm granted options on parcels of land. Stavros Amitsis, holder of the Saulet option, had exhausted his credit line and could not secure financing at EFS&L to purchase this property. Nikitas Pepis and Lynn Yao - two Amitsis associates - sought EFS&L loans with which to purchase the Saulet and Ames Farm parcels. Marilyn Ortalano, an EFS&L loan officer, informed the loan committee that if the loans were approved, Amitsis ultimately would receive the proceeds thereof. She also informed them that Robert Evans, EFS&L's board chairman, wanted the Yao and Pepis loans approved to keep Amitsis afloat. Brechtel urged the loan committee to approve the transactions.

On December 18, 1984, the $420,000

Pepis loan received committee approval. At a January 11, 1985 closing, Saulet sold its parcels to G&N Enterprises, a company recently acquired from Amitsis by Paul Baltas and LLoyd Broussard. G&N paid Saulet $52,500 cash and executed a note for the balance of the $350,000 purchase price, securing the credit portion with a mortgage on the property. Brechtel and Gattuso both signed the instrument transferring the Saulet parcels to G&N. Later that day, as planned, Pepis took title to the parcels in a second closing and assumed the note executed by G&N. EFS&L received a second mortgage on the Saulet parcels as security for the Pepis loan. Six days later, the full EFS&L board approved the Pepis loan. Loan committee notes circulated at the board meeting reflected that the Saulet property secured that

loan. Although board minutes for the January 17, 1985 meeting note the presence of Brechtel and Gattuso, the minutes reflect no disclosure by either of them of their interest in the Pepis transaction. Gattuso testified that he informed Evans of his and Brechtel's interest and that both abstained from the vote of approval.

In March 1985, the loan committee approved the $500,000 Yao transaction. The record contains no minutes reflecting approval of this loan by the full EFS&L board. On April 1, 1985, Yao took title to the Ames Farm parcel, giving in return cash and a note secured by the property. Brechtel and Gattuso attended that closing and signed the act of sale. EFS&L received a second mortgage on the Ames Farm property.

By 1986, Pepis and Yao were

experiencing difficulty meeting their obligations under the Saulet and Ames Farm notes. On April 22, 1986, to avoid a foreclosure EFS&L purchased the first mortgage on the Saulet parcels. On April 29, 1986, Gattuso and Brechtel were advised by letter from Roy Gattuso of Yao's delinquency on the Ames Farm note and that yao would seek to refinance his debt to the partnership through EFS&L. Roy Gattuso also advised that if yao failed to obtain supplemental financing through EFS&L, foreclosure proceedings would be initiated. On June 19, 1986, the EFS&L board approved a $1.8 million loan permitting Yao to work out his financial problems. Brechtel, but not Gattuso, attended the June 19 meeting. Brechtel testified that he disclosed his and Gattuso's interest in the Yao loan and abstained from voting on

it. The minutes from the June 19 meeting and the testimony of two other board members belie Brechtel's statement.

The grand jury indicted Brechtel and Gattuso on four counts of unlawful participation in benefits from savings and loan transactions, in violation of 18 U.S.C. §§ 2, 1006. Counts one and two related to the initial loans by EFS&L to Pepis and Yao, respectively; count three to EFS&L's buyout of the pepis mortgage,

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As applicable here, 18 U.S.C. § 1006 provides: [w]hoever, being an officer, agent or employee of or connected in any capacity with . . . any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation [,] . . . with intent to defraud the United States or . . . any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

The Crime Control Act of 1990, Pub. L. 101-647, § 2595(a)(4)(B), 104 Stat. 4907 (1990) substituted "institution, other than n insured bank (as defined in section 656), the accounts of which are insured by the Federal Deposit Insurance Corporation" for "institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation" in § 1006, reflecting absorption by the former agency of the latter. Congress also has amended the penalty provisions of § 1006 to provide for a maximum fine of $1,000,000 and a maximum prison term of 20 years. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, § 961(e), 103 Stat. 500 (1989).

and count four to EFS&L's final loan to Yao. The district court denied motions by both Brechtel and Gattuso to dismiss counts of the indictment as multiplicitous. The jury acquitted Brechtel and found Gattuso guilty on count one, found both defendants guilty on counts two and four, and acquitted both defendants on count three. Brechtel and Gattuso unsuccessfully moved for judgment of acquittal and for new trial.

The district court sentenced both defendants to one year of halfway house confinement, payment of incarceration costs and the statutory assessments,k and restitution to the Resolution Trust Corporation. Brechtel and Gattuso timely appealed.

ANALYSIS

On appeal, both defendants challenge the sufficiency of the evidence and contend that the district court improperly permitted testimony regarding their violation of civil banking regulations. Brechtel further challenges the district court's refusal to: (1) dismiss counts of the indictment as multiplicitous, (2) permit his presentation of habit evidence, and (3) grant him a new trial. He also maintains that the statute of limitations barred his prosecution.

1. Multiplicity

Brechtel first faults the district court's denial of his motion to dismiss portions of the indictment on multiplicity grounds. An indictment is multiplicitous if it charges a single offense in multiple counts, thus raising the potential for multiple punishment for the same offense, implicating the fifth

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E.g., United States v. Lemons, 941 F.2d 309 (5th Cir. 1991).

amendment double jeopardy clause. Legislative intent typically is dispositive of the multiplicity inquiry. When considering an indictment charging separate offenses arising from a series of related acts, we must determine whether Congress intended separate punishments. Where a defendant suffers convictions on multiplicitous counts, we must remand so that the government may dismiss improper charges and the trial

court may resentence the defendant. Like other determinations regarding double jeopardy, we review district court rulings on multiplicity claims de novo.

Brechtel suggest that the two loans to Yao constituted individual steps in an overarching scheme to procure improper benefit from EFS&L through sale of the Ames Farm parcel. By charging the two Yao transactions as separate offenses, Brechtel argues that the government improperly splintered a single offense. he claims that in **United States v. Lemons**, we found that multiplicity tainted an indictment under identical circumstances. We are not persuaded.

Lemons involved a bank-fraud prosecution under 18 U.S.C. §

E.g., **id.** (citing **United States v. Swaim**, 757 F.2d 1530 (5th Cir.), cert. denied, 474 U.S. 825 (1985)).

See **Missouri v. Hunter**, 459 U.S. 359-69 (1983)(where multiple punishments imposed in single prosecution, the double jeopardy inquiry is only whether legislature intended such multiple punishment).

United States v. Heath, 970 F2d. 1397 (5th Cir. 1992), cert. denied, 113 S.Ct. 1643 (1993); Lemons.

See **United States v. Vasquez-Rodriguez**, 978 F.2d 867 (5th Cir. 1992).

941 F.2d 309 (5th Cir. 1991).

1344. the indictment charged Lemons with separate violations of § 1344 for each of eight occasions on which he indirectly received or caused the bank to disburse funds. We noted that, although Lemons improperly received and caused disbursement of bank funds on several occasions, his acts constituted a single execution of a fraudulent scheme. We thus concluded, relying on the language of § 1344, that the indictment charged a single violation in multiple counts.

Because of the differences between 18

U.S.C. § 1006 and § 1344 Lemons is not dispositive of the case at bar. Rather than punishing "execut[ion] . . . of a scheme or artifice to defraud," 18 U.S.C. § 1006 punishes bank officials who "receive[] . . . any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of . . . [the] institution."

" This language suggests intent to punish receipt of improper benefit from individual transactions, rather than from overarching schemes. Brechtel violated § 1006 each time he benefitted from an extension of credit to Yao. The district court properly rejected his contrary contention.

2. Limitations Period

Brechtel next asserts that the five-year limitations period of 18 U.S.C. §

3282 bars his prosecution. He urges that the ex post

Section 3282 provides "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

facto clause of Article I, § 9, cl. 3 of the Constitution precludes application to him of the ten-year limitations period provided for by 18 U.S.C. § 3293. this argument misperceives the law.

Recent Supreme Court teachings reject the proposition that retroactive legislation violates the ex post facto clause merely because it adversely affects the position of criminal defendant. Rather, that clause prohibits any enactment of statutes which: (1) punish as a crime an act previously committed which was innocent when done;

(2) make more burdensome the punishment for a crime, after its commission; or (3) deprive one charged with a crime of any defense available according to law at the time when the act was committed. Only statutes withdrawing defenses related to the definition of the crime, or to the matters which a defendant might

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That clause, regulating the authority of Congress, provides "No Bill of Attainder or ex post facto Law shall be passed."

Congress expressly indicated that § 3293, adopted August 9, 1989, would apply to offenses committed before and for which the limitations period had not run as of its enactment. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, § 961(1)(3), 103 Stat. 501 (1989).

Collins v. Young, 497 U.S. 37, 50 (1990).

Id. at 41 (citing **Beazell v. Ohio**, 269 U.S. 167 (1925)). Pre-**Youngblood** jurisprudence suggested that statutes retroactively prejudicing "substantial rights" of criminal defendants also might

violate the ex post facto clause. See.g., **Miller v. Florida**, 482 U.S. 423, 433 (19987); **Weaver v Graham**, 450 U.S. 24, 29 n.12 (1981). However, **Youngblood** makes clear that "substantial rights" language in earlier opinions does not expand the bases upon which a criminal defendant may premise an ex post facto challenge. Rather, only retroactive criminal statutes violating the principles set forth in **Beazell** and **Calder v. Bull**, 3 U.S. (3 Dall.) 386 (1798), implicate "substantial rights" for the purpose of ex post facto clause analysis. **Youngblood**, 497 U.S. at 46.

plead as justification or excuse, fall within the latter group. Plainly, extension of the limitations period neither criminalizes previously innocent conduct nor enhances the punishment for an existing crime. Further, while § 3293 deprives Brechtel of the five-year limitations period in effect when the questioned transactions occurred, it did not deprive him of a defense within the meaning of the ex post facto clause. This contention lacks merit.

3. Habit Evidence

At trial, Brechtel sought to present testimony by his stock broker James Mangum. Through Mangum's testimony, Brechtel sought to establish that, as a matter of habit, he took an entirely passive role in his real estate and stock investments, permitting advisors of act on his behalf without inquiry into the substance of the transactions. they proposed. Mangum's testimony, Brechtel

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Youngblood, 497 U.S. at 49-50.

Our colleagues in other circuits have reached similar conclusions with regard to the retroactive application of § 3293. **United States v. Taliaferro**, 979 F.2d 1399 (10th Cir. 1992); **United States v. Knipp**, 963 F.2d 839 (6th Cir. 1992): **United States v. Madia**, 955 F.2d 538 (8th Cir. 1992); see also **United States ex rel. Massarella v. Elrod**, 682 F.2d 688 (7th Cir. 1982) (retroactive extension of unexpired limitations period does not violate ex post facto clause), cert. denied, 460 U.S. 1037 (1983); **United States v. richardson**, 512 F.2d 105 (3d Cir. 1975) (same) (dictum); **Clements v. United States**, 266 F.2d 397 (9th Cir.) (same), cert. denied, 359 U.s. 985 (1959); **Falter v. United States**, 23 F.2d

420 (2d Cir.) (same) (L. Hand, J.), cert. denied, 277 U.s. 590 (1928). Of course, the instant case requires no decision concerning the propriety of legislation reviving criminal liability after lapse of the previously applicable limitations period.

Brechtel concedes that mangum did not advise him with regard to real estate investment. Brechtel sought to present Mangum's testimony as a substitute for that of real estate advisor Sam

asserts, would have tended to negate the mental state required for conviction under § 1006 by demonstrating ignorance regarding his interests in the Ames Farm and Saulet parcels. The district court excluded Mangum's testimony under Fed. R. Evid. 403, finding any probative value it might have had substantially outweighed by its likely tendency to confuse jurors.

Relying on our opinion in **United States v. Riley**, Brechtel argues that the district court erred in refusing to permit Mangum's testimony. The defendant in **Riley**, indicted for misapplication of

bank funds under 18 U.S.c. § 656, sought to introduce evidence that the institution routinely engaged in transactions similar to those underlying the charges against him. Because the trial court's exclusion of that evidence effectively prevented Riley from presenting his defense - that he believed the transactions proper and hence lacked fraudulent intent - we reversed the conviction. Brechtel contends that **Riley** mandates reversal in the instant case. We do not agree.

Mangum's proffered testimony did not involve Brechtel's business relationship with real estate advisor Sam Gattuso. Further, it involved Brechtel's standard operating procedure for stock transactions, which involve substantially less formality than the real estate transactions here at issue. Thus,

Mangum's proffered

Gattuso, who died prior to trial.

The district court, in the alternative, excluded Mangum's testimony as irrelevant because it related to stock rather than real estate transactions.

550 F.2d 233 (5th cir. 1977).
testimony had at best tenuous relevance and, even if relevant, would have had far less probative force than the evidence at issue in **Riley**. The chain of analogies required to ground relevance of this evidence might well have rendered it confusing to the jury. Well-settled rubrics consign rulings on admissibility of evidence to sound trial court discretion, and require particular appellate court deference to rulings under Fed. R. Evid. 403 based on the risk of jury confusion. While the discretion which district courts enjoy does not extend to the exclusion of crucial relevant evidence establishing a valid

defense, the questionable relevance, low probative value and potential for jury confusion presented by Mangum's testimony distinguish this case from **Riley** and persuade that its exclusion did not amount to an abuse of discretion.

4. Evidence of Regulatory Violations

See **United States v. Qaoud**, 777 F.ed 1105 (6th Cir. 1985) (evidence regarding defendant judge's "general pattern" of refusing assistance to influence peddlers irrelevant and properly excluded in RICO prosecution where not crucial to defense), cert. denied, 475 U.S. 1098 (1976).

E.g., **united States v. Jimenez Lopez**, 873 F.2d 769 (5th Cir. 1989).

United States v. Allibhai, 939 F.2d 244 (5th Cir. 1991) (citing **United States v. Edelman**, 873 F.2d 791 (5th Cir. 1989)), cert. exclusion of defense evidence on this basis.

Riley.

Compare **United States v. Kelly**, 888 F.2d 732 (11th Cir. 1989) (in prosecution of attorney for drug offenses involving

client, error to exclude evidence - highly relevant to mental state - of defendant's understanding of his professional ethical obligations).

Both Brechtel and Gattuso claim that the district court erred in permitting testimony by Ronald Hall, an examiner with the Office of Thrift Supervision. Over defense objection, Hall testified that regulations require directors to disclose any interest they may have in transactions under consideration by the bank and abstain from deliberations concerning such transactions, and prohibit loans in which bank officials have an interest unless made directly to the official in question. They argue that this testimony improperly suggested criminal liability flowing from a civil violation, and further improperly suggested the criminal intent required to convict them under § 1006. Mindful that

an abuse of discretion standard governs our review of evidentiary rulings, we find this argument lacks adequate persuasive force.

In **United States v. Christo**, relied upon by Brechtel and Gattuso, we reviewed a prosecution for misapplication of bank funds in which the government presented evidence of civil banking regulations which limited the amount of credit which the bank could extend to the defendant. Finding this evidence irrelevant to the issue of criminal liability, we held that in view of prosecution arguments and "the whole tenor of the trial," jury instructions permitting a conviction based upon the civil violation constituted

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Hall also testified that EFS&L board minutes and mandatory disclosures to banking authorities did not reveal the interests of Brechtel and Gattuso in the

Pepis and Yao transactions.

Jimenez Lopez

614 F.2d 486 (5th Cir. 1980).

plain error. Later cases have understood **Christo** as being principally concerned with bootstrapping of civil violations into criminal liability, and have permitted use of civil violation evidence in criminal prosecutions for more limited purposes. Further, we and our colleagues in other circuits have recognized the value of limiting instructions in attenuating any improper effect of such evidence when used for a permissible purpose.

The case at bar differs substantially from **Christo**. Testimony regarding civil regulations constituted only a minor portion of Hall's testimony. To the extent that he mentioned disclosure requirements, they permissibly assisted

the jury in understanding the significance of EFS&L's board minutes and management disclosures to thrift authorities. Hall's statement concerning the prohibition on interested director transactions properly tended to demonstrate the defendants' motive for nondisclosure. The government did not

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Id. at 492.

See **United States v. Cordell**, 912 F2d 769, 777 (5th Cir. 1990) (evidence of civil regulation admissible to demonstrate bank's responsibility for allegedly misapplied funds); **United States v. McElroy**, 910 F.2d 10216, 1023-24 (2d Cir. 1990) (evidence of regulations limiting lending for purchase of stock on margin admissible in criminal prosecution to explain basis for bank lending policies); **United States v. Smith**, 891 F.2d 703, 710 (9th Cir. 1989) (evidence of civil regulation admissible to show motive for false statements), cert. denied, 498 U.S. 811 (1990); **United States v. Stefan**, 784 F.2d 1093, 1098 (11th Cir.) (evidence of civil regulation admissible to demonstrate motive for and assist jury in understanding series of "straw man" transactions), cert. denied, 479 U.S. 855, 479 U.S. 1009 (1986).

Cordell; McElroy; Smith; Stefan.

We note that Brechtel and Gattuso admitted their interest in the Saulet and Ames Farm parcels and hence in the Pepis and Yao transactions, resting their defenses solely on absence of criminal argue that nay civil regulatory violation by Brechtel and Gattuso could alone give rise to criminal liability, and the district court admonished the jury that "[a] violation of banking regulations in and of itself does not amount to criminal conduct under federal law. The government must prove the elements of the offense beyond a reasonable doubt." We cannot conclude that Hall's testimony regarding civil regulations "impermissibly infect[ed] the very purpose for which the trial was being conducted. The district court did not abuse its discretion in permitting Hall's testimony. 5. Sufficiency of the Evidence

Both Brechtel and Gattuso challenge the

sufficiency of the evidence supporting their convictions. In order to convict a defendant of improper participation in bank transactions under § 1006, the government must demonstrate: (1) the defendant's connection with a protected institution; (2) direct or indirect receipt of some benefit from a bank transaction; and (3) intent to .

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intent. Thus, Hall's testimony that brechtel and Gattuso had interests in the Pepis and Yao transactions sufficient to trigger a duty of disclosure under civil regulations did not prejudice the defendants.

Christo, 614 F.2d at 492.

Brechtel purports to challenge the district court's denial of his motions for judgment of acquittal under Fed. R. Crim. P. 29 (a) as well as raise a sufficiency claim. By presenting defense evidence, Brechtel waived any objection to the district court's denial of his Rule 29(a) motion at the close of the government's case-in-chief. E.g., **United States v. Elam**, 678 F.2d 1234 (5th Cir. 1982). Thus, Brechtel's challenge to the

denial of his latter Rule 29(a) motion simply restates the sufficiency claim.

defraud. Brechtel and Gattuso claim only that the government adduced insufficient evidence of their criminal intent.

We have long recognized the § 1006 insider participation provision as a typical conflict of interests prohibition. Thus, a fiduciary who benefits or causes loss to the bank by knowingly subordinating the institution's interests to his own in a transaction for which he has responsibility acts with the "intent to defraud" required by § 1006. As direct evidence of mental state is seldom available, the government may demonstrate that element of a § 1006 violation by circumstantial evidence. An

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United States v. Griffin, 579 F.2d 1104 (8th Cir.) (citing **United States v. Hykel**, 461 F.2d 721 (3d Cir. 1972)),

cert. denied, 439 U.S. 981 (1978). With respect to the "intent to defraud" element of section 1006, the defendants' jury was charged that:

> To act with "intent to defraud" means to act knowingly with the specific intent to deceive or cheat for the purpose of causing some financial gain to oneself. In this connection, the government does not need to prove that the United States, Enterprise Federal or anyone was actually defrauded. Similarly, the Government is not required to show whether or not Enterprise Federal suffered any loss as a result of the defendants' alleged actions. The term "to deceive or cheat" recognized and includes the principle wherein one connected with a bank acts ostensibly solely for the interest of the bank while he, without complete disclosure, has a pecuniary interest which might subvert his undivided loyalty.

Unied States v. Kehoe, 573 F.2d 335 (5th Cir.), vacated on other grounds, 579 F.2d 971 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979); **Beaudine v. United States**, 368 F.2d 417, 420 (5th Cir. 1966), cert. denied, 397 U.S. 987 (1970).

See **Beaudine**, 368 F.2d at 420.

Cf. **United States v. Staller**, 616 F.2d 1284 (5th Cir.) (government may prove "guilty knowledge" required for counterfeiting conviction by circumstantial evidence), cert. denied,

449 U.S. 869 (1980).

inference of intent to defraud arises where a responsible bank insider acts to procure a transaction which he knows will benefit him, without disclosing his interest therein.

Well-settled law governs our sufficiency inquiry. We must view the evidence, giving due regard to the trier's credibility calls, and draw all reasonable inferences which favor the verdict. If the evidence so viewed would permit a rational jury to find all elements of the crime beyond a reasonable doubt, we must affirm the conviction. The evidence need not exclude all hypotheses of innocence. Applying these standards, we find the evidence sufficient to support the convictions in this case.

a. Brechtel

Special Agent David Lyons of the F.B.I. testified that Brechtel acknowledged an expectation that yao would use proceeds of both EFS&L loans for purchase of the Ames Farm parcel. The jury properly could discredit Brechtel's denial on the witness stand that he ever had such an understanding.— Marilyn Ortalano's testimony permitted a jury conclusion that Brechtel knowingly failed to disclose his interest in the initial Yao transaction and

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See **United States v. Kimmel**, 777 F.2d 290 (5th ir. 1985) (approving jury instruction permitting inference that defendant intended natural and probable consequences of knowing act), cert. denied, 476 U.S. 1104 (1986); **Kykel** (evidence that defendant failed to disclose and actively concealed interest in mortgage agreement supported finding of intent to defraud under § 1006).

Glasser v. United States, 315 U.S. 60 (1942).

Jackson v. Virginia, 443 U.S. 307 (1979).

E.g., Heath.

acted to procure its approval by the loan committee. Such evidence adequately supports Brechtel's conviction on count two.

With regard to count four, Roy Gattuso's April 29 letter and Brechtel's claim that he abstained from voting on the Yao workout loan reflect Brechtel's knowledge of his interest in that transaction on June 19, the date it obtained board approval. discrediting Brechtel's contrary testimony, the jury reasonably could have inferred from the absence of contrary mention in the June 19, 1986 board minutes that Brechtel failed to disclose his interest in the latter yao transaction and participated in its consideration. Brechtel's conviction on count four finds ample

support in the record.

b. Gattuso

EFS&L minutes and Gattuso's own testimony indicate his presence at the meeting during which the board ratified the initial Pepis loan. Gattuso's insistence on the witness stand that he informed Bob Evans of his interest in that transaction and that he and Brechtel left the January 17 meeting during its consideration permitted the jury to conclude that Gattuso knew at that time of his interest in the initial Pepis loan. discrediting Gattuso's contrary assertion, the jury could infer from absence of any mention in the minutes regarding Gattuso's departure from the meeting, abstention from voting on the Pepis transaction, or disclosure of an interest in that transaction, that he did

none of those things. Sufficient evidence supports Gattuso's conviction on count one.

Although a closer case than count one, we likewise believe that constitutionally sufficient evidence supports Gattuso's conviction on the second count of the indictment. The key issue here is whether there was sufficient evidence of Gattuso's intent to defraud EFS&L regarding the first of the two loans made by EFS&L to Yao on March 19, 1985. As discussed above, Yao paid over the proceeds from that loan to the partnership in which Gattuso and Brechtel possessed an interest.

At trial, the government's theory regarding Gattuso's guilt on the second count was that he attended the March 19, 1985 board meeting and even voted to approve the first yāo loan, while both

knowing of his indirect pecuniary interest in the loan and without

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Teresa Lomonaco, EFS&L's executive secretary, testified that board members from time to time left meetings, and that she should only record those absences in the minutes if requested to do so. Gattuso urges that this testimony precludes any inference from silence in the minutes regarding his participation in board consideration of the initial Pepis loan. We disagree. The jury was free to discredit Lomonaco's testimony and, in any event, her statements at worst weaken the inference regarding Gattuso's participation in the board meeting to which silence in the minutes gives rise. Notably, minutes from other meetings reflect non-participation by director in consideration of loans due to conflict of interest. This argument fails to persuade.

Gattuso insists that his signature on documents relating to the Saulet sale adequately disclosed his interest in the Pepis transaction, and negated any hypothesis of criminal intent. We are not persuaded. The record indicates that, when the full board of directors considered loans for ratification, it did not ordinarily have access to documentation underlying them. Absent disclosure by Gattuso, the board could have no knowledge of his interest in the Saulet transaction. Thus, Gattuso's knowing failure to disclose his interest at the board meeting amply supports a

finding of criminal intent.

disclosing that interest to the board. We agree with the government that a section 1006 violation is clearly established when a member of a federally insured financial institution's board fails to disclose a direct or indirect pecuniary interest in a loan being approved by the board. The only question regarding Gattuso's conviction on count tow is whether there was sufficient evidence from which a rational jury could find beyond a reasonable doubt that Gattuso both knew about the first yao loan before it was finalized and failed adequately to disclose his interest in the loan to responsible persons at EFS&L.

Because there is little question that no disclosure occurred by Gattuso or Brechtel regarding the partnership's interest in the first Yao loan, our chief

inquiry is whether the evidence at trial, which was wholly circumstantial, would permit a rational jury to find beyond a reasonable doubt that Gattuso knew that EFS&L was making a loan to Yao. At the outset, we observe that three larger circumstances militate in favor of such a finding: first, a jury could rationally conclude that a sophisticated real estate broker such as Gattuso -- who had been in the real estate business for over three decades -- would not likely have been in the dark about important business transactions directly affecting a partnership in which he had a significant interest. This is particularly true in view of the substantial evidence that Gattuso himself, on behalf of

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We see no need in the instant case to define the degree of indirect benefit required to make out a section 1006

violation since unquestionably the indirect benefit inuring to Gattuso from Yao's payment of the loan proceeds to the partnership was clearly substantial enough.

the partnership, signed the documents closing the sale of the Ames property to Yao contemporaneously with the finalization of the first loan to Yao.

Second, we observe that there was substantial evidence that Gattuso's co-defendant and business partner, Brechtel, and Gattuso's cousin and attorney for the partnership, Roy Gattuso, were both well aware that Yao was in the process of obtaining financing from EFS&L for the purpose of purchasing the Ames Farm property in early 1985. Although the fact that one's close business associates were privy to information highly relevant to a joint business concern does not by itself support a finding that the information was passed on to the other

partner, certainly it is probative and, when combined with other evidence, would permit an inference that communication occurred.

The closing of the sale, which was financed by the EFS&L loan, occurred on April 1, 1985. There is substantial evidence in the record that EFS&L's executive committee -- of which Brechtel, but not Gattuso, was a member -- approved the first loan on March 7, 1985. As discussed infra, there was also evidence offered at trial that the bank's board approved of the loan later that monthly, on March 19. Finally, as discussed infra, at trail the government conclusively proved that the first Yao loan -- which was in the form of a line of credit -- was formally opened on April 1, 1985, the same date as the closing of the sale of the Ames property. On that same day, Yao also executed a promissory note and collateral mortgage note.

In early 1985, Yao exercised an option contract to purchase the Ames Farm property from the partnership.

That inference would be strengthened by the fact that Roy Gattuso was Phillip Gattuso's cousin, although mere consanguinity is not sufficient by itself to conclude that one relative necessarily informed the other relative of pertinent information. Cf. **United States v. Thompson**, No. 92-1037, unpub. op., p. 9,

n. 14 (5th Cir. March 24, 1993)("In the instant case, the government asks that we infer from the loan of the car and allowing his

Third, we observe that the timing of Yao's exercise of the option on the Ames property and Yao's obtaining the loan, which occurred in early 1985, were roughly contemporaneous with Gattuso's involvement in the Pepis loan scheme. Although the two real estate transactions were distinct, the government presented substantial evidence that Nikitias Pepis and Lynn Yao were each affiliated with Stavros Amitsis. A jury could rationally infer that pepis and Yao acted in conjunction. That is, in view of the overlapping timing between the Pepis and Yao transactions and corresponding loans and the debtors' common link to Amitsis, a rational jury could believe that the Yao loan and the Pepis loan were part of a common plan or scheme to defraud EFS&L.

Cf. Fed.R.Evid. 404(b). Accordingly, a rational jury could infer that Gattuso's guilty knowledge regarding the Pepis loan extended to the Yao loan.

Yet such larger circumstantial factors, by themselves, would not permit a rational jury to find Gattuso's guilt beyond a reasonable doubt. Thus, an examination of the government's other evidence is in order. Of particularly importance is Government Exhibit 20, a two-page document entitled "Executive Committee Meeting of March 7, 1985, Loans for Ratification," which lists a

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brother access to his house that Kenneth Thompson knew that his brother planned to rob a bank. We decline the incitation.").

We previously held that there was sufficient evidence to support Gattuso's conviction under section 1006 for that count of the indictment.

Gattuso testified that he knew Yao was

affiliated with Amitsis.

dozen or so loans to be later ratified by the board of directors. Among them is a $500,000 line of credit to Lynn Yao. Although a notation on the document states, "SECURED BY VARIOUS PROPERTIES" -- and thus makes no specific mention of the Ames Property -- the closing of the sale of the Ames Property occurred less than two weeks later, on April 1, 1985. We believe that, assuming Gattuso saw this document, a rational jury could believe that Gattuso knew that the notation about Yao must have concerned a loan for the sale of the Ames Property.

At issue, however, is whether that document was seen by Gattuso at the March 19, 1985 board meeting. Admittedly, the two pages of typed minutes from the meeting make no reference to the ratification of the executive committee's

loans (including Yao's) on March, 1985. Moreover, Gattuso denied knowing that Yao was seeking financing for the purchase of the Ames Property until after the loan was finalized. Two pieces of evidence belie his claim. First, it is clear that Gattuso attended the board meetings in early 1985, including the March 1985 meeting, and there is no indication that he made disclosure of his interest in the Yao loan or even abstained from voting in any ratification of committee-approved loans. Second, on the top of page two of the document entitled "Loans for Ratification" -- which included the Yao loan -- appears the date "March 19, 1985." This is evidence, albeit not conclusive evidence, from which a rational jury could infer that the board of directors did indeed ratify the executive committee loans (including

Yao's) at the March 19, 1985 board meeting. Furthermore, in Gattuso's own trial testimony, he stated that he believed that in the spring of 1985 the board of directors was required to ratify all committee-proved loans.

We additionally observe that the $500,000 loan to Yao in the spring of 1985 was in the form of a line of credit. The promissory note and collateral mortgage note executed by Yao in favor of EFS&L were signed on April 1, 1985. According to the express terms of the collateral mortgage note, "Lender has this date agreed to make a loan . . . to Borrower up to the amount of Five Hundred Thousand and No/100 ($500,000) DOLLARS . . . ." This, Yao's actual line of credit was formally opened on April 1, 1985. Notably, the date that the Ames Property sale closed was also April 1, 1985. It

is undisputed that Phillip Gattuso attended the closing; indeed, his signature appears on the documentation memorializing the closing. Because Gattuso signed documentation at the closing, a jury could rationally infer that he knew that the sale of the property was being financed by EFS&L. Thus, even if Gattuso did not vote to ratify the line of credit at the March 19, 1985 board meeting and only discovered the loan afterwards, a rational jury could infer that Gattuso would have discovered that Enterprise was financing the loan on April 1, 1985. Thus, even as late as that date, Gattuso still could have informed the bank of his conflict and prevented the consummation of the transaction involving EFS&L

It is common knowledge that participants at a real estate closing -

- in particular, the seller -- typically would not be ignorant of the buyer's source of financing. A rational jury could thus disbelieve Gattuso's claim that he was unaware of the source of Yao's financing when Gattuso attended the April 1 closing.

funds.

In sum, although admittedly a close case, we conclude that a rational jury could find beyond a reasonable doubt, in view of the totality of circumstantial evidence, that Gattuso, with the intent to defraud, knowingly "share[d] in or receive[d] directly or indirectly . . . money . . . through" EFS&L. 18 U.S.C. § 1006.

With respect to count four, we also believe that a rational jury could find beyond a reasonable doubt that Gattuso intended to defraud EFS&L in violation of 18 U.S.C. § 1006. Admittedly, there is no evidence that Gattuso was present at the June 19, 1986 board meeting where

Yao's second loan was approved. There is, however, direct evidence that would permit a rational jury to conclude beyond a reasonable doubt that Phillip Gattuso did know, as early as April of 1986, that Yao was seeking supplemental financing from EFS&L in order to stave off the partnership from

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Among the government's evidence at trail was an EFS&L cashier's check made out to Vezina and Associates -- Roy Gattuso's law firm -- in the amount of $96,000.00 The check, which was dated April 1, 1985, was part of the down payment for the sale of the Ames Property. In turn, the Vezina law firm made out separate checks to Brechtel (and his wife) and Estate of Sam Gattuso (of which Phillip Gattuso was the executor) in the amount of $5,955.60 and $8,933.40, respectively. The back of the check to Vezina and Associates bears Neil Vezina's stamped endorsement and is dated April 2, 1985. The back of the check to Gattuso is endorsed "Estate of Sam Gattuso" and is dated April 12, 1985.

As we discussed supra, the government's evidence offered at trial would permit a rational jury to find beyond a reasonable doubt that Brechtel was present at the board meeting where

the second Yao loan was approved and voted for it without disclosing his interest. Although Brechtel testified that he did indeed disclose his and Gattuso's interest in the second Yao loan at the June 19 board meeting, other evidence contradicts his bare assertion.

foreclosing on the Ames Property. In particular, the government offered a copy of a letter written by Roy Gattuso to his cousin Phillip in April 1986 explicitly stating that Yao would be attempting to work out additional financing from EFS&L in order to preclude a foreclosure by the partnership. the government adequately established that Phillip Gattuso did not disclose his interest in the second Yao loan following receipt of that letter. The government also offered undisputed evidence that Phillip Gattuso received a check that was directly traceable to the ultimate loan proceeds from the second Yao loan. Thus, the loan proceeds from the second Yao loan did not merely

benefit the partnership in which Phillip Gattuso possessed an interest, but benefitted Gattuso directly.

We hold that the government need not offer evidence that a board member such as Gattuso actually voted or otherwise engaged in affirmative conduct, in his capacity as a responsible bank official, to secure a loan in which he possessed a pecuniary interest. Rather, mere knowledge that such a loan is being obtained coupled with a failure to disclose his interest establishes a violation of 18 U.S.C. § 1006. A board member of a

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When the Ames Property was sold on April 1, 1985, the partnership assumed a first mortgage on the property and EFS&L assumed a second mortgage on the property, which was inferior to the first mortgage.

There is a document in the record that shows that apparently some official or officials in EFS&L knew that a portion of

Yao's second loan was going to Gattuso. However, that document is dated August 12, 1986 -- well after the board approved the second loan.

financial institution such as Gattuso is a classic fiduciary who owes the institution an affirmative duty to disclose all potentially substantial conflicts of interest. He cannot escape that duty simply by not attending the board meeting at which a transaction implicating those conflicts is approved while thereafter pocketing the proceeds.

6. New Trial Motion

In his final assignment of error, Brechtel essentially reiterates his previous points, asserting that at minimum they required the district court to grant his motion for new trial. The trial court's superior vantage point on the weight and effect of evidence provides the basis for our review of its

new trial rulings only for abuse of discretion. As Brechtel's other assignments of error lack merit, we cannot conclude that the district court abused its discretion in denying his motion for new trial. This claim also lacks merit.

CONCLUSION

For the foregoing reasons, the convictions are AFFIRMED.

Although the jury instructions in the instant case and some section 1006 cases speak of an "act with the intent to defraud" by a defendant, see, e.g., **Beaudine**, 368 F.2d at 420, we do not believe that a defendant must literally engage in a specific action aimed at defrauding a federally-insured institution in order to violate section 1006. Rather, we believe that by intentionally failing to disclose a known conflict of interest, a fiduciary such as a board member "acts" to defraud by continuing on in his fiduciary capacity and, at the same time, failing to apprise responsible officials in his institution of the conflict.

E.g., **United States v. Baytank (Houston), Inc.**, 934 F.2d 599 (5th Cir.

1991); **United States v. Arroyo**, 805 F.2d 589, 599 (5th Cir. 1986).

POLITZ, Chief Judge, Concurring in Part and Dissenting in Part:

I agree with most of the majority opinion. There is sufficient evidence to support Brechtel's convictions on counts tow and four and Gattuso's conviction on count one. I concur in the affirmance of the convictions on these counts. I find the evidence in support of Gattuso's convictions on counts two and four to be woefully inadequate. I must dissent from the majority's holding to the contrary.

It is not the function of an appellate court to fill in ~~the gaps and voids~~ in the evidence and to rule on the basis of evidence which could have or might have been offered. We are to review solely on the basis of what in fact was offered in evidence at trial.

In order to sustain a conviction the

evidence need not eliminate all hypotheses of innocence. OUr precedents, however, make equally clear that mere consistency with a theory of guilt will not suffice. Rather, where the evidence viewed most favorably to the government provides equal or near equal support to inferences of guilt and innocence, a rational jury necessarily must entertain a reasonable doubt.

The majority initially reasons that, in view of Government Exhibit 20 and Gattuso's testimony regarding EFS&L loan approval

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Clark v. Procunier, 755 F.2d 394 (5th Cir. 1985).

practices, a rational jury could conclude that the full EFS&L board considered and approved the Yao transaction at its March 19, 1985 meeting. Government Exhibit 20

consists of two pages detailing approval of loans by the bank executive committee. Its first page indicates that the executive committee considered those transactions on March 7, 1985. At the top of its second page, which contains the reference to the initial Yao transaction, Government Exhibit 20 bears the notation "March 19, 1985, Cont." Further, during cross-examination, Gattuso testified to his belief that, in early 1985, loans generally required approval from both the full board and the executive committee. Certainly, if the EFS&L board approved the initial Yao transaction at that time - concededly in Gattuso's present - a jury could infer the mental state required by § 1006. I cannot, however, agree that the evidence relied upon so heavily by the majority would permit a rational jury to reach

that conclusion beyond a reasonable doubt.

The record is silent about the discrepancy in dates between

I note that Gattuso expressed reservation about that statement. The record reflects the following exchange:

Q. The board of directors had not stopped ratifying the actions of the executive committee at this time, had it?

A. To my knowledge, no, I guess. I don't have that information in front of me to know that.

Q. the loans which the executive committee approves, that still would go over to the board for approval; isn't that right?

A. I would think so.

Trial Transcript, at 491 (emphasis added).

the first and second pages of Exhibit 20 or the significance of the "March 19, Cont." notation. At best, ;that exhibit permits an inference as to the date on

which the executive committee approved the initial Yao transaction. It does not purport of indicate when or if the full board acted on the transactions detailed. Although Gattuso testified that transactions generally required approval by the full board as well as the executive committee, the government produced no evidence tying the initial Yao loan to any particular meeting. Documentary evidence suggests that the EFS&L board never considered this transaction: although copies of minutes filed in evidence reflect approval of executive committee actions on many occasions, the record is devoid of any evidence indicating approval of actions taken by the executive committee on March 7 or March 19. In any event, Gattuso's testimony, corroborated by board minutes, indicates that with near uniformity, the

board gave its assent to loans about two weeks after executive committee action. considering the record as a whole, Gattuso's bare and equivocal statement that the board "generally" approved loan transactions after executive committee action, even supplemented by Exhibit 20, simply does not amount to proof beyond a reasonable doubt that the board considered the Yao transaction on March 19, 1985 in Gattuso's presence.

Alternatively, the majority suggests that even if Gattuso did not vote to approve the initial Yao loan on March 19, the jury

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Such a delay would place approval of the initial Yao loan at the April 1985 board meeting. The minutes of that meeting reflect that Gattuso was not in attendance.

could have inferred his knowledge that EFS&L financed the Ames Farm purchase

from his presence at the April 1 closing. The majority opines that if Gattuso learned of EFS&L's interest in the loan on April 1, his failure to stop the transaction and inform the bank of his interest gives rise to an inference of intent to defraud under § 1006. I simply cannot accept this proposition.

Lynn Yao produced a cashier's check - not a bank check - at closing. Further, Roy Gattuso - not Phillip Gattuso - managed the Ames Farm partnership. The government produced no evidence that Roy Gattuso ever informed Phillip Gattuso regarding Yao's financing, or even that he generally provided such information to his cousin regarding real estate sales. Further, Phillip Gattuso had an extremely attenuated interest in the Yao transaction: his father's estate owned ten percent of the parcel sold. In view

of these facts, I do not believe that a jury could infer, from Gattuso's mere presence at the Ames Farm closing, that he knew EFS&L had provided funds to Lynn Yao for the purchase. Even if I agreed with the majority's proposition, I could not agree that Gattuso's knowledge at the closing would support criminal liability under § 1006. It is not contested that when yao arrived at the Ames Farm closing EFS&L had completed the transaction, at least to the extent of $96,000, without a suggestion of the exercise of influence or even passive approval by Gattuso. The insider participation provisions

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See **United States v. Thompson**, No. 92-1037, slip op. at 9n.14 (5th Cir. March 24, 1993)(mere fact that defendant lent car to his brother did not permit inference that he knew of criminal purpose for which car would be used).

of § 1006 seek to protect financial institutions from influence by

fiduciaries with divided loyalties. Acceptance by an insider of benefit from a bank transaction where the insider learns of the transaction only after its completion cannot give rise to that concern. I would hold that a jury could not infer the intent to defraud required by § 1006 merely from such facts.

As to Count 4, the majority reasons that receipt of Roy Gattuso's April 29, 1986 letter placed Phillip Gattuso on notice of his interest in the latter Yao transaction. It then holds that, given such knowledge, the jury could infer intent to defraud from Gattuso's failure to make disclosure, notwithstanding his absence from the meeting at which the board approved that loan and the absence of any evidence indicating his active pursuit of its approval. The April 29 letter, in relevant part, stated "Mr. Yao

is seeking financial arrangements with Enterprise Federal for payment of the above captioned debt. If Enterprise fails to extend credit to Mr. yao, I will commence foreclosure proceedings immediately." Receipt of this letter does not establish Gattuso's knowledge that Yao actually followed through on his expressed intention, or that his application met with sufficient lower-echelon approval at EFS&L to bring a proposed transaction before the board for approval. I am persuaded that a rational jury could not find, beyond a reasonable doubt, on the basis of the April 29 letter alone,e that Gattuso knew the EFS&L board was considering the Yao workout loan. The jury

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See **United States v. Munna**, 871 F.2d 515 (5th Cir. 1989); **Beaudine v. United States**, 368 F.2d 417 (5th Cir. 1966).
perforce could not find, therefore, that

Gattuso's failure to disclose gave rise to an inference of criminal intent.

For these reasons, I concur in part and dissent in part.

I would not today determine whether failure by a responsible insider to disclose a known interest in a transaction under consideration could give rise to an inference of intent to defraud in the absence of affirmative acts to procure it.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-3342

UNITED STATES OF AMERICA,
Plaintiff-Appellants

VERSUS

RONALD C. BRECHTEL and
PHILLIP H. GATTUSO,
Defendants-Appellants

Appeals from the United States District Court for the Eastern District of Louisiana

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O R D E R :

IT IS ORDERED that the motion of appellant, Ronald C. Brechtel, for leave to file a petition for rehearing out of time, and if granted, an extension to do so up to and including September 3, 1993, is granted.

HENRY A. POLITZ

CHIEF JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellants

versus

RONALD C. BRECHTEL and
PHILLIP H. GATTUSO,

Defendants-Appellants

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITIONS FOR REHEARING

(September 21, 1993)

Before POLITZ, Chief Judge, KING and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby

DENIED. Judge Politz would grant the rehearing requested by Phillip H. Gattuso for the reasons assigned in his dissent to the majority opinion.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge